A **AJWA FOR FOOD INDUSTRIES CO (MIGOP), EGYPT**

v.

PACIFIC INTER-LINK SDN BHD & ANOTHER APPEAL

B COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
BALIA YUSOF WAHI JCA
[CIVIL APPEALS NO: W-02(NCC)-90-2011 &
C W-02(NCC)-130-2011]
16 MAY 2011

ARBITRATION: *Agreement - Reference of dispute - Whether sales contracts incorporated standard terms and conditions containing arbitration*
D *agreement - Whether appellant had knowledge of arbitration agreement - Arbitration Act 2005, ss. 8, 9, 37 & 42*

ARBITRATION: *Arbitration tribunal - Jurisdiction - Whether parties agreed to arbitrate disputes - Whether Arbitration Tribunal had*
E *jurisdiction to hear arbitration case*

ARBITRATION: *Award - Challenging arbitration award - Circumstances in which court may interfere with arbitral award - Limitation in scope of interference - Whether Arbitration Tribunal drawn wrong inferences of facts - Whether there was evidence of miscarriage of*
F *justice - Whether there was procedural impropriety warranting interference - Arbitration Act 2005, ss. 8, 9, 37 & 42*

The appellant's appeals were against the decision of the High Court in dismissing the appellant's application to set aside or
G amend the Arbitration Tribunal award. The appellant relied on the grounds that the Arbitration Tribunal had no jurisdiction to hear the arbitration case in question as there was no agreement between the parties to arbitrate their disputes. In the alternative, the appellant prayed for the determination of question of law
H under s. 42 of the Arbitration Act 2005 ('the Act') and the issue of damages. The appellant had, at the same time, filed an appeal against the same two awards to the Palm Oil Refiners Association of Malaysia ("PORAM") Arbitration Appeal Board where the appeal was pending. In its decision, the Arbitration Tribunal held
I that it had the necessary jurisdiction to deal with the matter as there was clearly an express agreement, in cl. 31, to refer the

dispute to arbitration, and the decision was affirmed by the High Court. In opposing the appellant's appeals, the respondent relied on four sales contracts, all of which incorporated cl 31 of the standard terms and conditions relating to the arbitration agreement. The appellant, however, contended that the said cl 31 was never incorporated and in any case it never had sight of the said terms and conditions.

Held (dismissing both appeals with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The court's discretion in setting aside the arbitral award is limited to the narrowly defined circumstances in line with the modern international arbitral practice. Based on ss. 8, 9, 37 and 42 of the Act, the court should be slow in interfering with an arbitral award, unless it is a case of patent injustice which the law permits in clear terms to intervene. In the present case, there was no indication that the Arbitration Tribunal had drawn any wrong inferences of facts in coming to its findings and the findings were supported by sufficient evidence adduced during the proceedings. There was no evidence of miscarriage of justice or procedural impropriety to warrant interference. (paras 13 & 16)

(2) The appellant produced two e-mail messages to support its allegations that the contract between the parties was oral contract and did not include the standard terms and conditions. However, there were absolutely no references to the alleged oral contracts at all in any of the e-mails. The Arbitration Tribunal, having considered all the relevant considerations, was correct in its findings that the evidence did not support the formation of any oral contract but point invariably to the four sales contracts as constituting the true and proper agreements between the parties. (para 20)

(3) The sales contracts expressly incorporated the respondent's standard terms and conditions, which in turn contained the arbitration agreement and satisfied the writing requirements under s. 9(4) and (5) of the Act to constitute a valid arbitration agreement between the parties, even though the arbitration agreement was not signed by the appellant; *Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor* (refd). (para 26)

A **(4)** It is common knowledge that international agreements between parties doing business from different part of the world are concluded and performed without the need for signature. Suffice that the parties have communicated their agreement on the terms by whatever form of communication. (para 29)

B **(5)** In the present case, the entire placement of the contract was done on the basis of the respondent's standard terms and conditions. There was clear evidence that the appellant had knowledge of the standard terms and conditions and the C arbitration agreement in cl. 31. The evidence also showed that there was past practice by the parties of referring disputes to arbitration *via* FOSFA and PORAM. Bearing in mind the course of dealings and conduct between the parties and the nature of the transactions, the court was satisfied that firm D sales contracts were concluded between them and sales contracts were valid and binding even without the appellant's signature. (para 31)

(6) The High Court Judge was right in finding that s. 42 of the E Act was applicable by virtue of the agreement in the arbitration agreement that all legal matters would be governed and interpreted in accordance with the laws of Malaysia and subject to the exclusive jurisdiction of the Malaysian courts in Kuala Lumpur. Hence, the submission on the non-applicability F of s. 42 was baseless. (para 37)

(7) The price mechanism adopted by the PORAM Price Settlement Committee in the instant case was in accordance with the principle enunciated in s. 74 of the Contracts Act 1950, where the normal measure of damages is the loss and G damage which naturally arises on the usual course of things. PORAM Arbitration Tribunal had taken into account all relevant considerations in awarding compensation on the basis of the difference between the contract price specified in the sales contract and the market price issued by the PORAM H Price Settlement Committee on the date of default. (paras 41 & 43)

Bahasa Malaysia *Translation Of Headnotes*

I Rayuan perayu adalah terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu untuk mengetepikan atau meminda award Tribunal Timbang Tara. Perayu bergantung atas alasan bahawa Tribunal Timbang Tara tidak mempunyai bidang

kuasa untuk mendengar kes Timbang Tara yang dipersoalkan kerana tiada perjanjian antara pihak-pihak untuk menimbangtara pertikaian mereka. Secara alternatif, perayu merayu untuk pemutusan persoalan undang-undang di bawah s. 42 Akta Timbang Tara 2005 ('Akta') dan isu berkaitan dengan ganti rugi. Perayu telah, pada masa yang sama, memfailkan rayuan terhadap kedua-dua award yang sama kepada Lembaga Rayuan Timbang Tara Persatuan Kilang Penapis Minyak Sawit Malaysia ('PORAM') di mana rayuan tersebut belum diputuskan. Dalam keputusannya, Tribunal Timbang Tara memutuskan bahawa ia mempunyai bidang kuasa yang diperlukan untuk menguruskan perkara tersebut kerana terdapat perjanjian yang jelas, di dalam kl. 31, untuk merujuk pertikaian kepada Timbang Tara, dan keputusan tersebut disahkan oleh Mahkamah Tinggi. Dalam membantah rayuan perayu, responden bersandarkan pada empat kontrak jualan, yang kesemuanya memasukkan kl. 31 yakni terma-terma dan syarat-syarat standard berkaitan dengan perjanjian timbang tara. Perayu, walau bagaimanapun, menghujah bahawa kl. 31 tersebut tidak pernah dimasukkan dan ia tidak pernah melihat terma-terma dan syarat-syarat tersebut.

Diputuskan (menolak kedua-dua rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Budi bicara mahkamah dalam mengetepikan award timbang tara adalah terhad kepada hal keadaan yang dinyatakan secara terhad sejajar dengan amalan timbang tara antarabangsa moden. Berdasarkan kepada ss. 8, 9, 37 dan 42 Akta, mahkamah tidak boleh campur tangan dalam award timbang tara, kecuali dalam kes yang jelas tidak adil yang mana undang-undang dengan jelas membenarkan campur tangan. Di dalam kes ini, tidak ada indikasi bahawa Tribunal Timbang Tara telah membuat apa-apa inferens yang salah dalam mencapai dapatannya dan dapatannya disokong oleh keterangan yang mencukupi yang dikemukakan semasa prosiding. Tidak ada keterangan ketidakadilan atau ketidakwajaran prosedur untuk mewajarkan campur tangan.

(2) Perayu mengemukakan dua mesej e-mel untuk menyokong dakwaan bahawa kontrak antara pihak-pihak adalah kontrak lisan dan tidak termasuk terma-terma dan syarat-syarat standard. Walau bagaimanapun, tidak ada langsung rujukan kepada kontrak lisan yang didakwa dalam mana-mana e-mel tersebut. Tribunal Timbang Tara, selepas mempertimbangkan

kesemua pertimbangan yang relevan, adalah betul dalam dapatannya bahawa keterangan tersebut tidak menyokong pembentukan apa-apa kontrak lisan tetapi menjurus semata-mata kepada empat kontrak jualan sebagai membentuk perjanjian yang benar dan sewajarnya di antara pihak-pihak.

(3) Kontrak-kontrak jualan secara jelas memasukkan terma-terma dan syarat-syarat standard responden, yang sebaliknya mengandungi perjanjian timbang tara dan memenuhi keperluan bertulis di bawah s. 9(4) dan (5) Akta untuk membentuk perjanjian timbang tara yang sah antara pihak-pihak, walaupun perjanjian timbang tara tidak ditandatangani oleh perayu; *Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor* (dirujuk).

(4) Adalah pengetahuan umum bahawa perjanjian-perjanjian antarabangsa antara pihak-pihak yang mempunyai hubungan perniagaan daripada bahagian dunia yang berbeza diputuskan dan dilaksanakan tanpa keperluan tandatangan dengan syarat pihak-pihak telah mengkomunikasikan perjanjian terma-terma mereka walau dengan apa cara komunikasi sekalipun.

(5) Dalam kes ini, keseluruhan pengaturan kontrak dilakukan atas dasar terma-terma dan syarat-syarat standard responden. Terdapat keterangan yang jelas bahawa perayu mempunyai pengetahuan tentang terma-terma dan syarat-syarat standard dan perjanjian timbang tara di dalam kl. 31. Keterangan juga menunjukkan bahawa adalah sebahagian pelaksanaan oleh pihak-pihak untuk merujuk pertikaian kepada timbang tara melalui FOSFA dan PORAM. Memandangkan pengaturan dan tindakan antara pihak-pihak dan keadaan transaksi, mahkamah berpuas hati bahawa kontrak jualan yang tetap telah dimuktamadkan antara mereka dan kontrak jualan sah dan mengikat walaupun tanpa tandatangan perayu.

(6) Hakim Mahkamah Tinggi betul dalam mendapati s. 42 Akta adalah terpakai memandangkan terdapat perjanjian dalam perjanjian timbang tara bahawa kesemua perkara berkaitan undang-undang akan tertakluk dan ditafsirkan menurut undang-undang Malaysia dan tertakluk kepada bidang kuasa eksklusif Mahkamah Malaysia di Kuala Lumpur. Maka, hujahan tentang ketidakpakaian s. 42 adalah tidak berasas.

(7) Mekanisme harga yang digunakan oleh Jawatankuasa Penyelesaian Harga PORAM dalam kes ini adalah mengikuti prinsip yang dinyatakan di dalam s. 74 Akta Kontrak 1950, di mana penentuan biasa untuk ganti rugi adalah kehilangan dan

kerugian yang biasanya berbangkit daripada perjalanan biasa. Tribunal Timbang Tara PORAM telah mengambil kira kesemua pertimbangan yang relevan dalam mengawardkan pampasan atas dasar perbezaan di antara harga kontrak yang dinyatakan di dalam kontrak jualan dan harga pasaran yang dikeluarkan oleh Jawatankuasa Penyelesaian Harga PORAM pada tarikh kemungkiran.

Case(s) referred to:

Baker v. Yorkshire Fire and Life Assurance Co [1892] 1 QB 144 ***(refd)***

Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation [1999] 4 CLJ 665 CA ***(refd)***

Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor [2008] 3 CLJ 741 CA ***(refd)***

Frank Fehr & Co v. Kassam Jivraj & Co [1949] 82 Ll L Rep 673 ***(foll)***

Heller Factoring (M) Sdn Bhd (Formerly known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd [1995] 3 CLJ 9 CA ***(refd)***

Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***

Lesotho Highlands Development Authority v. Impregilo SpA & Others [2005] UKHL 43 ***(refd)***

Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Morgan v. (W) Harrison Ltd [1907] 2 Ch 137 ***(refd)***

Oonc Lines Ltd v. Sino-American Trade Advancement Co Ltd [1994] HKCU 35 ***(refd)***

Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1969] 1 LNS 172 HC ***(refd)***

Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

TN Rao v. Balabhadra AIR 1954 Mad 71 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 2, 3(3)(b), 8, 9(2), (3), (4), (5), 21(3)(b), 37(1), 42

Contracts Act 1950, s. 74

For the appellant - Elaine Yap (Eddie Chuah with her); M/s Wong & Partners

For the respondent - Arun Krishnalingam (Mathew Kurzen & Marlene Blanche Culaz with him); M/s Sativale Mathew Arun

[Appeal from High Court Malaya, Kuala Lumpur; Originating Summons No: D-24 NCC-175-2010 & D-24 NCC-173-2010]

Reported by S Barathi

A

JUDGMENT

Ramly Ali JCA:

[1] There are two appeals filed before us by the same appellant against the same respondent. As agreed by the parties these two appeals are to be heard together. The parties had also agreed that the decision in the first appeal will bind the second appeal.

[2] The first appeal (W-02(NCC)-90-2011) is against the decision of the learned High Court Judge dated 6 December 2010 dismissing the appellant's application by way of an originating summons to set aside or amend the Arbitration Tribunal Award made on 13 April 2010 for a sum of USD1,374,200 with costs of RM5,000 in favour of the respondent. The second appeal (W-02(NCC)-130-2011) is against the decision of the same High Court Judge made on the same date 6 December 2010 dismissing the appellant's another application to set aside or amend another Arbitration Tribunal Award made on 13 April 2010 for a sum of USD2,261,100 with costs of RM5,000, also in favour of the respondent.

[3] In both appeals, the ground put forward by the appellant in applying to set aside or amend both the Arbitration Tribunal Awards was that the said Arbitration Tribunal has no jurisdiction to hear the arbitration case in question as there was no agreement between the parties to arbitrate their disputes.

[4] At the same time, the appellant had also filed an appeal on the same two arbitration awards to the Palm Oil Refiners Association of Malaysia ("PORAM") Arbitration Appeal Board, and the appeal is still pending.

[5] In opposing the appellant's application, the respondent submitted that there exists an arbitration agreement between the parties relying on the four sales contracts in exh. A5, ie, sale contracts Nos. PIL/PO/SC/449/08; PIL/PO/SC/0720/08; PIL/PO/SC/0722/08 and PIL/PO/SC/0782/08. The standard terms and conditions (STC) of the respondent's contract (as appeared in the plaintiff's terms and conditions) in cl. 31 reads:

> all disputes under the sales contract together with this STC shall be resolved amicably but if the dispute cannot be resolved then parties will opt for arbitration in Kuala Lumpur under PORAM

rules of arbitration and appeal. All legal matters will govern and interpreted in accordance with the laws of Malaysia and subject to the exclusive jurisdiction of the Malaysian court in Kuala Lumpur.

[6] On this issue of cl. 31, the appellant contended that the said cl. 31 was never incorporated and it never had sight of the said terms and conditions.

[7] The Arbitration Tribunal held that it has the necessary jurisdiction to deal with the matter as there was clearly an express agreement (as in cl. 31) to refer their dispute to an arbitration, if the dispute cannot be resolved. The learned High Court Judge affirmed this finding by the Arbitration Tribunal.

[8] In affirming the finding of the Arbitration Tribunal, the learned High Court Judge relied on the provisions of s. 9(2) of the Arbitration Act 2005 which states that "an arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement". Section 9(5) further states that "a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement".

[9] The law on the issue of an existence of an arbitration agreement is very clear and unambiguous. The relevant section is s. 9 of the Arbitration Act 2005. The learned High Court Judge had clearly elaborated on this point in his grounds of judgment at p. 3 in the following words:

with regard to the issue of the existence of an arbitration agreement, this is governed by Section 9 of the Arbitration Act 2005. Section 9(1) of the Act defines 'arbitration agreement' to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, either contractual or not. Section 9(2) says that an arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement. Subsection (3) of section 9 of the Act is crucial. There it is provided that an arbitration agreement shall be in writing. Whether an arbitration agreement is in writing or otherwise, it is controlled by subsection (4) of section 9 of the Act. Under the said subsection, an arbitration agreement is in writing if (i) it is contained in a document signed by the parties;

A (ii) it is contained in an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement, or (iii) if it is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. Then subsection (5) of section 9 of the Act provides as follows:

B

> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

C We fully agree with the learned High Court Judge on this point.

[10] In establishing that cl. 31 of the standard terms and conditions relates to the arbitration agreement, the respondent relied on four sales contract (as in exh. A5). Each of the sales D contract, just before the signature column, there is a clear express statement to the effect:

> All other terms, conditions, and rules do not in contradiction with the above as for Plaintiff's terms and conditions.

E **[11]** The appellant said that the said cl. 31 was never incorporated and it never had sight of the said standard terms and conditions. From the records and evidence available before us, we find that the Arbitration Tribunal has sufficiently considered this issue in coming to its decision in making the awards in favour of F the respondent. To that effect the Arbitration Tribunal has correctly made several findings of facts to support its findings. The relevant findings of facts are as follows:

(a) the appellant did not deny that there was an agreement to G purchase the products from the respondent through telephone and e-mail exchanges (this fact is not in dispute);

(b) that the appellant and the respondent have had a long trading relationship for over 20 years;

H (c) there was past practice for the respondent and the appellant to refer their disputes to arbitration *via* FOSFA or PORAM; and

(d) one Ms Omnia Talaat of the appellant has conceded that I there were prior sales contracts signed by the appellant.

[12] As an obiter of facts, the Arbitration Tribunal is empowered to make these findings of facts. The learned High Court Judge was correct in not interfering with these findings. There is no evidence of miscarriage of justice or procedural impropriety to warrant interference. At our level, we feel that there is no ground for us to interfere with these findings which had been affirmed by the learned High Court Judge. We affirm that the Arbitration Tribunal had correctly made the above findings based on the relevant evidence, and documents before it.

Section 37 Of The Arbitration Act 2005: Setting - Aside Of Arbitral Award

[13] Section 37(1) of the Arbitration Act 2005 provides for the various grounds on which an arbitral award may be set aside. The onus is on the party making the application to provide proof. The court's discretion in setting aside arbitral award is now limited to the narrowly defined circumstances in line with the modern international arbitral practice. The effect of the present ss. 8, 9, 37 and 42 of the Arbitration Act 2005 is that the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and refrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the Arbitration Act 2005 which is for all intent and purpose to promote one-stop adjudication in line with the international practice (see: *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v. Impregilo SpA & Others* [2005] UKHL 43).

[14] The Federal Court has laid down a well-settled principle in the case *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743, that an arbitration award is final, binding and conclusive; and can only be challenged in exceptional circumstances. Siti Norma FCJ in that case stated:

> The law regarding the effect of arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an Arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award.

[15] Raja Azlan Shah J (as His Royal Highness then was) in the case of *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172 had once stated:

> It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood."

[16] The authorities clearly indicate that error in drawing wrong inferences of facts from the evidence is not in itself a sufficient basis to set aside an arbitral award. In the present case, there is no indication that the Arbitration Tribunal had drawn wrong inferences of facts in coming to his findings. In fact, his findings were supported by sufficient evidence adduced during the proceedings.

Existence Of Arbitration Agreement

[17] The legal position is very clear: that parties are bound by the terms of the contract which they had executed and this includes reference to another incorporated document where those terms can be found whether they take the trouble of reading them or not. There is imputed knowledge that the terms of the document incorporated are binding as if it was written into the contract itself.

[18] The Indian court in the case of *TN Rao v. Balabhadra* AIR 1954 Mad 71, supports the above proposition. Venkatarama Aiyar J in that case ruled as follows:

> When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into that document and ascertain the terms. An examination of the authorities in which this view has been adopted shows that they are either cases in which the other contract is one between the same parties and therefore the terms including the arbitration clause might be taken to have been within the knowledge of the parties; or cases in which there is a reference to a specific document which was in existence and whose terms could easily be ascertained if the parties wanted to. It is reasonable to hold

that when the parties had referred to a document which was in existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document and an arbitration clause contained in that document must, therefore, be held to be binding on them exactly as if it had been incorporated *in extenso* in the signed contract. The foundation of this reasoning is the existence of another specific document containing an arbitration clause. It is essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreements. Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the agreement actually signed by the parties there must at least be a specific contract or document containing such a clause in respect of which it might be said that it has been incorporated in the agreement of the parties by reference.

[19] In the present case, the respondent's standard terms and conditions were circulated to all buyers and additional copies were made available at all their branch offices. The appellant having bought from the respondent over a lengthy period of time had full knowledge and had done business throughout on the basis of the said respondent's standard terms and conditions. Therefore the sales contracts constitute the concluded contracts between the parties, the said standard terms and conditions clearly referred to and incorporated there, would be effective and binding upon the appellant regardless of its denials of having seen them.

[20] The appellant alleged that the contracts between them were oral contracts, either "through telephone conversations and e-mails exchanges", not including the standard terms and conditions. The appellant relied solely on the evidence of its foreign purchasing manager, one Ms Omnia Talaat to establish this. She produced two e-mail messages to support her contention, ie, e-mails dated 5 May 2008 and 7 September 2008 both from her to the respondent's representative, Mr George Boutros. It is noted that there is absolutely no reference to the alleged oral contracts at all in any of the said e-mails. The Arbitration Tribunal had correctly concluded that the appellant's allegation that the e-mails exchanges as well as the telephone conversations evidence the oral contracts have no basis whatsoever. The Arbitration Tribunal had considered all the relevant considerations before him and was correct in coming to his findings that the evidence does not support the formation of any oral contract but point invariably to the four sales contracts as constituting the true and proper agreements between the parties.

[21] The appellant strengthened its submission that the sales contracts are not binding as the appellant had never signed any of them, and therefore the Arbitral Tribunal had no jurisdiction to determine the dispute between the parties.

[22] There are two questions relating to this issue that need to be answered, namely:

(a) whether an arbitration agreement as contained in the respondent's standard terms and conditions which was incorporated into the sales contracts need to be signed by the appellant; and

(b) whether the sales contracts themselves need to be signed by the appellant who was the purchaser/buyer of the products in question.

[23] On the first question, we need to consider the relevant ss. 9(3), 9(4) and 9(5) of the Arbitration Act 2005. Sections 9(3) and 9(4) provide that the arbitration agreement must be in writing and the writing requirement is satisfied if the arbitration agreement is in a document signed by the parties or is in an exchange of letters, telex, facsimile or other means of communication which provide for a record of the agreement. As such, we are of the view that such a written agreement to arbitrate does not mean a formal agreement executed by both parties, so long as the arbitration agreement is incorporated into a written document. Section 9(5) further provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement provided that the arbitration agreement is in writing and the reference is such as to make the clause part of the agreement.

[24] It is settled law that an agreement to arbitrate must be in writing; but it is not the law that such an agreement must be signed. The Court of Appeal in the case of *Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor* [2008] 3 CLJ 741 ruled as follows:

> It follows that in the present instance it is not necessary for the first respondent, in order to succeed, for it to produce an agreement to arbitrate that is signed by the appellant before us. Suffice that there is such an agreement. In support of the learned judge's finding, learned counsel for the first respondent has placed reliance on the settlement agreement and in particular s. 1.02 of the recitals which we have already reproduced earlier in this

> judgment. The submission is that the sub-contract and the letter of award have been incorporated into the settlement agreement. Since the appellant is a party and a signatory to the settlement agreement, it is bound by the arbitration clause in the sub-contract. The appellant however contends that there has been no incorporation in the present case.

[25] In another case, *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation* [1999] 4 CLJ 665 the court said:

> ... The phrase written agreement in s. 2 of the Act does not demand of a formal agreement executed by the parties to the dispute. The agreement to which the section refers may be gathered from either a single document or a series of documents or, in some cases, a party may be estopped from asserting that there is no agreement. This principle is amply covered by authority.

(Although the above case was based on the 1952 Act, it applies with equal force to s. 9 of the Arbitration Act 2005).

[26] On the above authorities, we are of the view that the sales contracts which expressly incorporated the respondent's standard terms and conditions, which in turn contained the arbitrations agreement (as in cl. 31 thereof) satisfy the writing requirements under s. 9(4) and 9(5) of the Arbitration Act 2005 to constitute a valid arbitration agreement between the parties, even though the said arbitration agreement was not signed by the appellant.

[27] The position in Hong Kong and England on this issue is the same. The Hong Kong case of *Oonc Lines Ltd v. Sino-American Trade Advancement Co Ltd* [1994] HKCU 35 (Supreme Court Hong Kong) the court held that the existence of a written arbitration agreement can be evidenced by written communications exchanged between the parties, even though one party has never signed. The agreement containing the arbitration clause.

[28] The English case of *Baker v. Yorkshire Fire and Life Assurance Co* [1892] 1 QB 144 held that it is not necessary that in all cases the written agreement to refer the matter to arbitration must be signed by both parties. In another English case of *Morgan v. (W) Harrison Ltd* [1907] 2 Ch 137 the Court of Appeal held that an arbitration agreement may be deduced from correspondence between the parties.

[29] On the second question, we are of the view that the sales contracts issued by the respondent as the seller/vendor, need not be signed by the appellant who was the purchaser/buyer of the products in question. The sales contracts are valid and binding even without the appellant's signature. There is no law to require that a sale contract need to be signed by the purchaser of buyer in order for it to legally enforceable. It is common knowledge that international agreements between parties doing business from different part of the world (as in the present case) ranging especially in international sale of goods and charter parties are concluded and performed without the need for signature, so long as parties have communicated their agreement on the terms by whatever form of communication.

[30] The fact that the appellant had not dated or signed the sales contracts does not mean that there could be no concluded contracts between the parties. Where a contract had been signed by one party only, it could be enforced where there was evidence, such as part performance by one party and acceptance by the other, that the other party had elected to be bound by it. (see: *Heller Factoring (M) Sdn Bhd (Formerly known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd* [1995] 3 CLJ 9 - Court of Appeal).

[31] In the present case, given that the course of conduct between the respondent and the appellant whereby the entire placement of the contract was done on the basis of the respondent's standard terms and conditions; and given the fact that the appellant has received the four copies of the sales contracts and has signed three of the four contracts in which the terms and conditions including the arbitration agreement in cl. 31 are incorporated and thus binding on the appellant, even without the appellant's signature on each of them. At the oral hearing before the Arbitration Tribunal, there was clear evidence that the appellant had knowledge of the standard terms and conditions and the arbitration agreement. The evidence also shows that there was past practice by the parties of referring disputes to arbitration *via* FOSFA and PORAM. This was not disputed by the appellant. Bearing in mind the course of dealings and conduct between the parties and the nature of the transactions, we are satisfied that firm sales contracts were concluded between them including the arbitration agreement as in cl. 31 of the respondent's standard terms and conditions, which were duly incorporated into the sales contracts.

[32] We find support to the above conclusion in the decision of the English Court of Appeal in the case of *Frank Fehr & Co v. Kassam Jivraj & Co* [1949] 82 Ll L Rep 673. In that case the issue before the court's consideration was whether there was an agreement to arbitrate. The arbitration agreement was contained in a printed form which the buyer had sent to the seller. The seller never signed it but instead sent cable acknowledging the receipt of the printed form. The Court of Appeal took into account the course of conduct between the buyer and the seller which took the form of cables and airmails and ruled that there was a valid contract concluded between the parties and the seller's cable recognising the existence of the printed form of the contract which to their knowledge contained the arbitration clause satisfied the statutory requirement that there should be a "written agreement to submit to arbitration".

Section 42 Of The Arbitration Act 2005/Issue Of Damages

[33] The second ground of the appeal is that the learned High Court Judge had erred in law under s. 42 of the Arbitration Act 2005 and in fact by failing to appreciate that the PORAM Arbitration Tribunal was not entitled to make a finding of liquidated damages in the sum of USD1,374,200 or any sum in favour of the respondent.

[34] The appellant's alternative prayer in encl. 1 is for the determination of question of law under s. 42 of the Arbitration Act 2005 with regard to the alleged lack of jurisdiction of the PORAM Arbitration Tribunal and on the issue of damages.

[35] The respondent's position is that the appellant has no basis to invoke s. 42 of the Act which falls under Part III of the Arbitration Act 2005. The respondent argued that the PORAM arbitration between the appellant and the respondent falls under the category of an international arbitration by virtue of the definition under s. 2 of the Act which defines "international arbitration" to mean "an arbitration where (a) one of the parties to an arbitration agreement at the time of the conclusion of that agreement, has its place of business in any state other than Malaysia". In the present case, it is not disputed that at the material times the appellant was having its place of business in Egypt, a state other than Malaysia. Therefore, the respondent submitted s. 42 which falls under PART III of the Act is not applicable by virtue of s. 3(3)(b) of the Act which provides that "In respect of an international, arbitration, where the seat of

arbitration is in Malaysia - (b) Part III of this Act shall not apply unless the parties agree otherwise in writing". The respondent further submitted, that there has never been any agreement in writing between the parties that PART III of the Act to apply.

[36] The appellant on the other hand contended that the contention of the respondent is misconceived. The appellant further contended that it has from the beginning disputed the existence of the arbitration agreement between the parties; and therefore it cannot be right to say that it cannot invoke s. 42 of the Act to refer the question of law - namely whether or not there was an arbitration agreement between the parties - to the court under the section.

[37] In this respect we are in full agreement with the finding of the learned High Court Judge that the provision of s. 42 of the Act is applicable. At p. 10 of grounds of judgment, the learned judge ruled:

> However, I think the Plaintiff made a valid argument that it could not be the intention of legislature to shut out a party to arbitration from invoking section 42 to raise a basic question of law such as that on the jurisdiction to arbitrate by the Tribunal to the Court. Such question goes to the root of the arbitration proceedings. Further, the Plaintiff has correctly pointed out that in the arbitration agreement relied upon by the Defendant (and which is being disputed by the Plaintiff), there is an agreement that all legal matters will be governed and interpreted in accordance with the laws of Malaysia and subject to the exclusive jurisdiction of the Malaysian Courts in Kuala Lumpur. By virtue of this agreement in the purported arbitration agreement, I am of the view that the Defendant submission on the non applicability of section 42 is baseless.

[38] On the question of damages in the sum of USD1,374,200 awarded by the PORAM Arbitration Tribunal to the respondent, the appellant has alleged that the respondent is not entitled to sum awarded because documentary evidence to prove the loss was not produced to the Arbitration Tribunal. The appellant contended that the PORAM Arbitration Tribunal has acted beyond its jurisdiction in adducing price information from PORAM Price Settlement Committee or for that matter taking into consideration evidence not submitted by the parties.

[39] Initially the respondent was claiming the difference between the market price and the contract price set out in its debit note dated 3 October 2008, based on the price it sold the goods to

another buyer after the appellant's non-acceptance and rejection of the goods. However, the PORAM Arbitration Tribunal did not accept the claim and called upon, as is the practice in PORAM Arbitrations the PORAM Price Settlement Committee to fix the price on the date of the default. This price represented the value of the goods to the respondent at the time of the breach.

[40] An arbitration tribunal is empowered to draw from its own knowledge and expertise in its determination especially when the arbitration is conducted by a specialised trade body with knowledge and expertise in the palm oil trade, as in the present case. Section 21(3)(b) of the Arbitration Act 2005 states that the power conferred upon the arbitration panel includes the power to "draw on its own knowledge and expertise" which is what the PORAM Arbitration Tribunal did in determining the measure and quantum of damages in the present case.

[41] We are satisfied that the price mechanism adopted by the PORAM Price Settlement Committee in the present case accords with the principle enunciated in s. 74 of the Contracts Act 1950 where the normal measure of damages is the loss and damage which naturally arises on the usual course of things. Where there is an available market, loss which arises is the difference between the contract price and the market price at the date of the default. This is the normal measure of damages that can be seen from the default clause in the PORAM contracts which reads: "The damages awarded against the defaulter shall be limited to the difference between the contract price and the market price on the date of default".

[42] This principle is also in line with decision of the Supreme Court in the case of *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783 where it was held:

> In the sale of goods, the principle of mitigation is the foundation of the normal rule for the measure of damages which requires an innocent party to act immediately upon the breach, buy or sell in the market.

[43] Going through the arbitration award (at pp. 159-188 of the records of appeal) we are convinced and satisfied that the PORAM Arbitration Tribunal has taken into account all relevant considerations in awarding compensation on the basis of the difference between the contract price specified in the sales

A contract and the market price issued by the PORAM Price Settlement Committee on the default date. This is the usual measure and feature of award of damages for non-acceptance of goods in international commodity transactions.

B **Conclusion**

[44] On the above considerations, we find that the appellant's grounds of appeals to set aside/vary the PORAM Arbitration Tribunal Award under ss. 37 and 42 of the Arbitration Act 2005 are misconceived both in law and fact. We therefore dismiss both the appeals (W-02(NCC)-90-2011; and W-02(NCC)-130-2011) with costs of RM10,000 to the respondent (for both appeals). We affirm the findings and decisions of the learned High Court Judge in both cases. We also make an order that deposits (in respect of both appeals) be paid to the respondent on account of fixed costs.

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